Supreme Court U.S.
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No. 01-932

In The

# Supreme Court of the United States

CRATER CORPORATION,

*Petitioner,*

v.

LUCENT TECHNOLOGIES, INC., AMERICAN TELEPHONE AND TELEGRAPH COMPANY, AND THE UNITED STATES,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit**

## REPLY TO BRIEFS IN OPPOSITION

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## CORPORATE DISCLOSURE STATEMENT

Petitioner is not publicly traded and has no parent or subsidiary or affiliated corporations. There is no publicly traded company that owns 10% or more of Petitioner's stock.

## REPLY TO BRIEFS IN OPPOSITION

In Respondents' briefs in opposition to Crater's petition for a writ of certiorari, they argue, principally, that: (1) Crater's questions relating to the state secrets privilege, and the district court's improper application of that privilege to bar relevant discovery, were not addressed by the Federal Circuit, and, for that reason, are not properly before this Court; (2) the government attorney's *ex parte* communications with the district court were justified by the government's invocation of the state secrets privilege; and (3) the question of whether Respondents' evidence was sufficient to support their motion to dismiss is not properly before this Court.

Each of these arguments is without merit.

### I. THE QUESTION OF WHETHER THE DISTRICT COURT INCORRECTLY AND OVERBROADLY APPLIED THE STATE SECRETS PRIVILEGE TO BAR RELEVANT DISCOVERY IN THIS CASE IS PROPERLY BEFORE THIS COURT.

Despite its disavowals, the Federal Circuit did, in fact, reach Crater's questions regarding the state secrets privilege. The court expressly found that the district court's orders relating to the privilege did not prevent Crater from discovering relevant evidence. App. 15a, 19a. This finding goes to the very heart of the questions presented by Crater for appeal.

Crater argues that, despite the wording of the district court's initial order as to the privilege – limiting discovery only as to Lucent's and AT&T's *governmental* use of the coupler – the district court did not so limit its subsequent rulings, but instead applied the privilege to prevent Crater from discovering relevant evidence regarding Lucent's and AT&T's *commercial* use of Crater's coupler,

evidence that would have defeated their government contractor defense. The Federal Circuit's holding relates directly to these questions, and justifies review by this Court.[1]

Even without the court of appeals' express language regarding the privilege, however, review by this Court would still be appropriate. The Federal Circuit specifically held that Respondents Lucent and AT&T were entitled to summary judgment in this case *because Crater had been given adequate opportunity for discovery as to Respondents' government contractor defense,* but had failed to present evidence opposing that defense. App. 15a. Implicit in this finding is the court's rejection of Crater's arguments regarding the state secrets privilege – the arguments that Crater did not, in fact, get adequate discovery. The Federal Circuit could not have ruled in Respondents' favor without resolving, to Crater's disadvantage, Crater's questions as to the district court's application of the state secrets privilege. This resolution by the Federal Circuit endorses the district court's privilege

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[1] The Federal Circuit's reasoning on this question is somewhat circular. The court states that, because the state secrets privilege could, by definition, be applied only to bar discovery as to Respondents' governmental uses of the coupler, that privilege could not have prevented Crater from discovering relevant evidence as to their commercial uses. App. 19a. However, that is precisely what Crater contends the district court did wrong. Crater claims that the district court went beyond the proper scope (and definition) of the state secrets privilege and misapplied it to prevent Crater from obtaining that relevant, indeed critical, evidence.

rulings, and this Court may, and should, correct this endorsement.[2]

## II. THE *EX PARTE* COMMUNICATIONS BETWEEN THE GOVERNMENT ATTORNEY AND THE DISTRICT COURT WERE NOT APPROPRIATE AND CANNOT BE JUSTIFIED BY THE INVOCATION OF THE STATE SECRETS PRIVILEGE.

Respondents' briefs on this point misstate Crater's position. Crater acknowledges that *in camera* proceedings may, in some circumstances, be appropriate in cases where the state secrets privilege has been invoked. However, in this case, the government and the district court went beyond any procedure that has been condoned by this or any other court. The government did not limit itself to the *in camera* presentation of documents, or even to the presentation of sworn testimony by government witnesses. In this case, the government lawyer provided unsworn and unrecorded arguments to the court that

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[2] As an apparent fall-back position, Respondents Lucent and AT&T claim that Crater mischaracterized the record regarding the Danzig declaration. That is not the case. Crater argues that Secretary Danzig was required to review each document for which the privilege was asserted – only in certain specifically limited circumstances is that requirement sometimes excused. *See* Pet. Br. at 16-18. No one in this case has maintained, nor can they, that Secretary Danzig reviewed each document. Not only did the government's attorney admit as much in court, but it is also clear from the record that a substantial number of the documents in question remain in the hands of third-party witnesses, and have not been retrieved or reviewed by any government official. Secretary Danzig's declaration does not state otherwise. *See* Pet. Br. at 16-18; App. 50a, 73a-79a, 114a, 117a-120a.

related directly to the merits of the case. *See* Pet. Br. at 9-10, 21-25; App. 52a-59a, 76a-77a, 85a-86a.

Moreover, these statements were not made, as Respondents suggest, solely at a time when the clarification and/or protection of secret government documents was an issue. Rather, on one occasion, the district court halted a hearing on pending discovery motions and took the government's lawyer to a back room to discuss the merits of those motions, and then ruled in Respondents' favor. Pet. Br. at 10; App. 52a-59a, 44a-47a. It is this type of unauthorized conduct that Crater challenges here.

## III. THE QUESTION OF THE SUFFICIENCY OF THE EVIDENCE SUPPORTING RESPONDENTS' MOTION TO DISMISS IS PROPERLY BEFORE THIS COURT.

Respondents Lucent and AT&T argue, first, that the question of the sufficiency of the Rominski affidavit was not decided by the Federal Circuit, and is, therefore, not properly before this Court, and, second, more generally, that the question of the sufficiency of Respondents' summary judgment evidence is not important enough to merit this Court's attention. Respondents are mistaken on both points.

Crater argues on this appeal that Respondents did not present sufficient evidence to support their motion to dismiss (later granted by the Federal Circuit as a motion for summary judgment). Pet. Br. at 11-13, 25-29. The sufficiency of the Rominski affidavit is critical to this determination. Because that affidavit was not based on the witness's personal knowledge, it could not have supported Respondents' motion and could not have served to shift the burden to Crater to submit evidence in opposition to that motion. Whether or not the Federal Circuit

expressly acknowledged that it was so finding, it could not have ruled against Crater on this issue without determining that the affidavit was acceptable.

There was, in fact, no evidence, properly submitted, to support Respondents' motion. The Rominski affidavit was deficient, and Crater had no opportunity to respond to any of the rest. Because the district court departed from established, and explicit, rules of procedure – and misstated and misapplied the law relating to those rules – and because the Federal Circuit sanctioned these departures, Crater was deprived of substantial rights, and lost this case without a fair hearing.

This Court's review of the procedures followed by the district court, and affirmed by the Federal Circuit, is required by those courts' substantial departure from the accepted and usual course of judicial proceedings, and from the rules governing those proceedings. Sup. Ct. Rule 10(a).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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